IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 91-8676

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JESUS ARMANDO FLORES,

Defendant-Appellant.

Appeal from the United States District Court for the
Western District of Texas
(EP-90-CR-258-1(H))

(February 5, 1993)

Before WISDOM, JOLLY, and DeMOSS, Circuit Judges.

E. GRADY JOLLY, Circuit Judge:[*]

Jesus Armando Flores was convicted of engaging in a continuing criminal enterprise in violation of 21 U.S.C. § 848(a), possessing with intent to distribute a quantity of cocaine in violation of 21 U.S.C. § 841(a)(1) and 18 U.S.C. § 2, using a communication facility to facilitate the commission of a felony in violation of 21 U.S.C. § 843(b), and money laundering in violation of 18 U.S.C.

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[*]Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

§ 3231.[1] He appeals his conviction for engaging in a continuing criminal enterprise because he contends that there was insufficient evidence to prove the requisite three predicate offenses. Additionally, he appeals his money laundering conviction on the basis that there was insufficient evidence to prove that the currency used to purchase the vehicles was the proceeds of a specified unlawful activity. Finally, he argues that the trial court incorrectly sentenced him by setting his base offense level at 46 based upon an incorrect amount of cocaine attributed to him during the conspiracy. Because we find no error after careful examination of each of these arguments, we conclude that the defendant's conviction and sentence will be affirmed.

I

Appellant Flores was the "key man" in a large scale drug conspiracy involved in the distribution and importation of varying quantities of cocaine. His operation, though relatively small scale in 1984 and 1985, grew larger and larger until his indictment in 1990.

[1]Also named in the indictment, along with Flores, were Joseph Harryrafael Peake, Luis Garcia, Peter Seaverns, Francisco Obregon-Sosa (a.k.a. Arturo Bermudez or El Ingeniero), Jesus Moncada, Luis Ascencion Roybal, George Virgil Enriquez, and Mark Rasmussen.

A

The Early Transactions

During 1984 and 1985 Ronnie Stinnett, a narcotics investigator with the Texas Department of Public Safety, met with Flores on several occasions in El Paso to buy cocaine from him. On March 1, 1984, Stinnett and fellow DPS investigator Castillo met with Flores to negotiate for the purchase of one ounce of cocaine; Flores delivered one ounce of cocaine to the agents and was paid $1800.

In June 1984, Officer Stinnett attempted to buy more cocaine from Flores, but Flores aborted the transaction after suspecting that he was being followed. On December 20, 1984, Officer Stinnett again contacted Flores; Stinnett met with Flores that evening and purchased two ounces of cocaine for $1700 each. Flores offered to sell Stinnett 10 kilograms of marijuana, but Stinnett declined to make such a purchase.

On March 4, 1985, Officer Stinnett talked to Flores about purchasing 600 pounds of marijuana. They agreed on a price of $400 per pound with Stinnett taking delivery on March 7. On March 6, Flores told Stinnett that his marijuana source had been arrested, but that he could provide Stinnett with ten to sixteen ounces of cocaine at $1500 per ounce; Stinnett agreed to buy ten ounces. Flores met with Stinnett and another agent on March 7 and urged them to purchase a full kilogram of cocaine. The agents eventually agreed to purchase sixteen ounces. Flores left the parking lot where the transaction took place and returned about an hour later

with an ounce of cocaine and a promise to deliver the rest later that evening. The agents purchased the ounce from Flores and immediately placed him under arrest.

B

Dealings with Peter Seaverns

Beginning in late 1988, Flores supplied cocaine to Peter Seaverns, the manager of Dove Motor Company, a used car dealership in El Paso. In April or May 1989, Seaverns bought a kilogram of cocaine from Flores. In July 1989, Seaverns bought another kilogram of cocaine from Flores for $13,000. Seaverns went to Flores's business, Vista Remodeling; Albert Dodd took the keys to Seaverns's car and returned a few moments later, leaving the kilogram of cocaine on the car's seat. Seaverns paid for the cocaine in installments, making a $5000 payment to Luis Roybal at a gas station at Flores's instruction. Seaverns knew Roybal by the name "Joe" and had met him in Flores's company on several prior occasions.

In April 1990, Seaverns again purchased cocaine from Flores. Seaverns went to Flores's residence and said he needed a kilogram of cocaine. Flores gave Seaverns's car keys to Joseph Peake, who drove away and returned about 45 minutes later, leaving the cocaine on the front seat of the car.

C

50 Kilograms of Cocaine

On July 18, 1989, Palmira Lopez, a special agent with the DEA, met with Antonio Ayala and Chris Taylor at an El Paso restaurant to negotiate for the purchase of cocaine. Agent Lopez initially discussed purchasing ten kilograms of cocaine; reluctant to sell ten kilograms at once, Ayala gave Lopez a sample and later sold her one kilogram of cocaine. Thereafter, Ayala stated that he could provide up to 50 kilograms to Lopez. Ayala then contacted Flores; he told Flores that he had a party interested in buying about 50 kilograms of cocaine. A few days later, at Dove Motor Company, Flores told Ayala that he could provide the cocaine for the deal at a price of $13,000 per kilogram.

On August 7, 1989, Agent Lopez and Detective Manuel Figueroa of the El Paso police department met with Ayala at a restaurant in El Paso to discuss the purchase of 50 kilograms of cocaine. Ayala told the agents that he was going to speak to his "source" and that he would meet with them later. From the restaurant, Ayala called Flores. Ayala then left the restaurant and was followed to Vista Remodeling. There Ayala met with Flores, Jesus Moncada (Flores's brother-in-law), and another man who was to deliver the cocaine.

The next morning, August 8, Ayala went to Moncada's apartment per Flores's instructions. Ayala received a key to the house where the cocaine would be delivered, which was owned by George Enriquez. Ayala then called Agent Lopez and the two agreed to meet at a

restaurant shortly thereafter to complete the transaction. When the group met at the restaurant, Figueroa went with Moncada to see the cocaine, and Ayala accompanied Lopez to see the money. Once Figueroa saw the cocaine, he was to call Lopez, and then she was to give the more than $600,000 in payment for the drugs to Ayala.

Figueroa and Moncada drove to the house, went into the garage, and waited for the cocaine to arrive. A few minutes later, a male drove up in a small automobile, gave the keys to Moncada and said "here it is," got into a pickup truck already parked at the house, and drove away. Figueroa was then shown 50 kilograms of cocaine in the back of the car. Figueroa called Lopez, the "bust" signal was given, and Ayala and Moncada were arrested. In addition to the cocaine, agents seized an address book from Moncada containing Flores's name and telephone number as well as the name and numbers of Luis Roybal.

Later that day, Flores called Seaverns and asked to meet him at the office of attorney Mike Villalba in El Paso. In Villalba's office, Flores explained that Moncada was supposed to deliver 50 kilograms of cocaine to a buyer around noon that day, but that Flores had not yet heard from him. Flores asked Seaverns to call another El Paso lawyer, Gary Hill, and find out whether Moncada had been arrested. Seaverns was unable to reach Hill.

D

The Villa Ahumada Incident

Between March and June 1990, Flores readied his organization for the importation of at least 1200 kilograms of cocaine by plane into northern Mexico. Preparations began in early March 1990, when Flores bought two four-wheel-drive Suburbans from Seaverns at Dove Motor Company. Flores told Seaverns the vehicles were headed for Mexico. When Flores purchased the vehicles, he was accompanied by Francisco Obregon-Sosa, Ismael Navarrete, Juan Carlos Lozoya, and two other young Hispanic males. Flores paid $21,300 in cash for a 1989 model and $24,700 cash for a 1990 model. Although Flores was the purchaser, he instructed Seaverns to place title to the vehicles in the names of the two young men, one of whom gave identification bearing two different names. Although Seaverns was required by I.R.C. § 6050-I to file an I.R.S. Form 8300 evidencing a cash transaction exceeding $10,000, he did not. About two weeks later, Seaverns sold a third Suburban to Flores for $20,000 in cash. Flores negotiated the purchase and picked up the vehicle the next day; Jesus Moncada delivered the cash payment. Because Flores requested that the vehicle not be placed in his name, Seaverns agreed to leave the title open without moving the vehicle through Dove Motor's inventory. Some time later, Ismael Navarrete picked up the title, which was put in the name of Roberto Luis Corral.

Obregon-Sosa and several others took the Suburbans to Industrial Communications in El Paso, where they purchased two-way

ham radio communication equipment capable of long distance, car-to-car, and ground-to-air communications. Mobile radio units were installed in two of the three Suburbans, from which the rear seats had been removed. A third mobile unit and a base unit were delivered without installation.

During May, agents intercepted several telephone conversations during which Flores and others discussed locating a suitable landing strip.[2] On May 8, Flores called and spoke with a man in Mexico about the location of several airstrips. Flores said that a strip some five hours away was too far, even though it was well paved. The man knew of a strip much closer, but not as well paved. The two men agreed to view the strips together soon. On May 23, Francisco Obregon-Sosa called Flores; Obregon-Sosa mentioned a meeting to be held about 35 minutes later to introduce Flores to "the pilot" and another person.

Also in May, Joseph Peake and Luis Garcia obtained a motor home on Flores's instructions. Peake, who had previously distributed cocaine and picked up vehicles for Flores, first went to Seaverns at Dove Motors. Seaverns referred Peake to the Easy Living RV Center. On May 25, 1990, Peake and Garcia, who used the name "Luis Martinez," bought a 1980 Dodge Travelon motor home from

[2]During May and June 1990, pursuant to court order, agents monitored incoming and outgoing telephone calls on several telephones used by Flores at Vista Remodeling and his residence, in addition to those placed to or from a cellular phone subscribed to by Luis Garcia.

the Easy Living RV Center. Garcia worked for Peake and Flores, and had previously served as nominee owner for a motorcycle and a car purchased by Flores. Garcia and Peake initially attempted to pay the $15,675 purchase price in cash. Because Easy Living would not accept a cash payment exceeding $10,000, they made two separate payments, first tendering $9750 in cash, then delivering a cashier's check for $6000 about an hour later. Later that afternoon, two other men picked up the motor home from Easy Living. Title was placed in the name of "Luis Martinez."

These preparations led up to the events of June 7, 1990, when DEA agents seized 1200 kilograms of cocaine from several aircraft in northern Mexico. In the early morning hours of June 7, the agents and Mexican police officers flew over a clandestine airstrip near Villa Ahumada, Chihuahua. They observed one airplane in the process of refueling, a tanker truck, and several Suburbans. A second plane soon landed at the strip. The agents then landed their plane on the airstrip, exited the plane, and prevented the other aircraft from taking off. Shots were fired and the suspects jumped into the Suburbans and drove off. At the site the agents found about 1200 kilograms of cocaine wrapped in yellow plastic. Agents retrieved various maps and documents from the planes showing that the flights had originated in Columbia. Near the strip, the agents found one of the three Suburbans Seaverns had sold to Flores in March. Jesus Moncada was arrested at the airstrip after he

approached the agents and began asking questions about the aircraft; he claimed to be "Gino Morales."

Soon after the agents had secured the airstrip, a third plane circled the strip and then proceeded about 50 miles east before landing on a dirt road. Two of the agents flew to the area where this plane had landed, searched it, and discovered 600 kilograms of cocaine inside.

A number of incidents followed the Villa Ahumada seizure that further implicated Flores in the affair. Peake left the Dodge motor home with Seaverns to sell, giving Seaverns the keys and title and telling him to get in touch with someone at a Ford dealership to obtain possession of the vehicle. Agents seized the motor home from Dove Motors in June 1990. Agents also intercepted several phone conversations pertaining to the Villa Ahumada affair. On June 12, Flores spoke with an unidentified male, who said "they've got my Guero over there...my son." Other callers also asked if "Guero" had been detained in Mexico. Several additional phone calls referred to the seizure and the detention of those involved in the offense in Mexico. On June 9, Flores arranged and paid for three charter flights to transport 10 to 12 passengers from El Paso to Miami. Joseph Peake accompanied the passengers on the first flight. He asked the pilot if the plane could fly as far as Bogota, Colombia; it could not. The pilot returned to El Paso and flew a second group of people to Florida on June 10, followed by a third group on June 12.

E

Additional Evidence

Additional evidence showed that during 1990, Flores paid for several chartered flights on Rasmark Jet Service, flying to Cancun, Detroit, San Diego, Florida, and other locales.[3] Flores's account with Rasmark was kept in the name of Vista Remodeling; when government agents sought Flores's account records in August 1990, Rasmark was unable to provide them because all the invoices had "inexplicably" been removed from the file. Rasmark had to reconstruct its records for those flights that employees could remember. Flores also sought to purchase four Lear Jet airplanes in early 1990; he was arrested before he could complete the purchase.

Flores's business, Vista Remodeling, proved to be little more than a front for his drug trafficking activities. In a search of the premises, agents saw scrap sheetrock and lumber, a pool table, and several old vehicles, but no inventory of building materials or other evidence that the business was currently operating. Analysis of the business records seized for both Vista Remodeling and Flores Jewelry (another business Flores owned and operated) for the first six months of 1990 showed that Vista had expenses totalling $188,321, while income was only $16,385. Records of Flores Jewelry

[3]Rasmark Jet Service was owned and operated by co-indictee Mark Rasmussen.

showed additional income of only $5,000. Flores's bank accounts for that period, however, showed deposits exceeding $240,000.

A portfolio seized from the premises contained Flores's business card and several handwritten pages documenting narcotics transactions involving substantial quantities of cocaine. The records reflected transactions involving "Ingeniero" (Obregon-Sosa) in amounts totalling $550,000, a 50 kilogram transaction in "L.A.," and additional cocaine transactions totalling $1,532,200.

F

Trial Court Proceedings

After indictment, the case proceeded to trial. A jury convicted Flores of conducting a criminal enterprise between March 1984 and June 1990 in violation of 21 U.S.C. § 848, possessing with intent to distribute cocaine on August 8, 1989, in violation of 21 U.S.C. § 841(a)(1) (resulting from the 50 kilograms of cocaine sold to Agent Lopez), using a telephone to facilitate the commission of a drug felony in violation of 21 U.S.C. § 843(b) (resulting from the conversations concerning the location of an airstrip), and conducting three financial transactions in March 1990 with the proceeds of unlawful activity in violation of 18 U.S.C. § 1956(a)(1)(B) (i.e., money laundering, resulting from the purchase of the three Suburbans from Seaverns). Flores timely filed this appeal.

Flores challenges his continuing criminal enterprise and money laundering convictions on the grounds that the evidence adduced was

insufficient to sustain the guilty verdicts. In his appeal of his sentence, Flores challenges fact findings made by the district court concerning the quantity of cocaine attributed to him for sentencing purposes. The government argues that sufficient evidence proves that Flores committed three or more felony drug offenses as part of a continuing series of violations, each of which satisfied the requirements for a predicate offense as set out by the CCE statute. Conversely, the government further argues that sufficient evidence proved that the money used by Flores to purchase three Suburbans was the proceeds of unlawful activity, and that the district court's decision to include 1200 kilograms of cocaine seized in Villa Ahumada and 256 kilograms of cocaine referenced on ledgers seized from Flores's business when calculating the relevant drug quantity for sentencing purposes was not clearly erroneous.

II

In reviewing a claim of insufficiency of the evidence, this court must view the evidence in the light most favorable to the government, making all reasonable inferences and accepting all credibility choices in favor of the jury's verdict. United States v. Nixon, 816 F.2d 1022, 1029 (5th Cir. 1987) (citing Glasser v. United States, 315 U.S. 60, 80, 62 S.Ct. 457, 469 (1942)). We must affirm the verdict if "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt."

Nixon, 816 F.2d at 1029 (quoting Jackson v. Virginia, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789 (1979)).

Fact findings made by the district court for sentencing purposes are reviewed for clear error. 18 U.S.C. § 3742(d); United States v. Pierce, 893 F.2d 669, 678 (5th Cir. 1990).

III

A

Flores presents a series of related arguments in his challenge to his conviction for engaging in a continuing criminal enterprise (CCE). First, he argues that to prove the offense of continuing criminal enterprise, the government was required to establish three or more related predicate drug offenses that occurred while he was acting in concert with five or more other people in relation to whom he occupied the position of an organizer or manager. He asserts that the three deliveries of cocaine in 1984 and 1985 were not related to the subsequent offenses occurring in 1988 through 1990, nor did they occur while he was acting in concert with five or more other people in relation to whom he occupied the position of organizer or manager. Therefore, he argues, these early transactions cannot constitute the predicate drug offenses establishing a continuing criminal enterprise.

He then asserts that of the three "remaining" predicate offenses,[4] the conspiracy count cannot constitute a predicate

[4]These offenses consist of a conspiracy charge on which the jury did not return a verdict because the district court directed

offense because: (1) the evidence was insufficient to establish the single conspiracy encompassing all the offenses from March 1984 until June 1990 as alleged in the indictment because the early transactions were not part of the same conspiracy as the later ones; (2) the evidence was insufficient to establish that at all times during the conspiracy five other people were involved in the illegal activity; and because (3) the jury never determined his guilt as to the conspiracy because this count was a lesser included count of the CCE offense.[5]

The government offense argues that sufficient evidence proved that the early cocaine sales were part of a single conspiracy spanning six years. Thus, it asserts, because the three early transactions were related and because they were part of the same conspiracy encompassing later events, the evidence proves that Flores committed three or more felony drug offenses as part of a continuing series of violations; thus, evidence of these early

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it to consider the count only if it found Flores not guilty of the CCE offense; a charge of possessing cocaine with the intent to distribute on August 8, 1989 (the 50 kilograms sold to Agent Lopez); and a charge of using a communication facility to facilitate the commission of a drug felony (the telephone conversations concerning the location of an airstrip). Flores does not contest the fact that the latter two offenses can serve as CCE predicate offenses.

[5]As stated in Footnote 4, the jury returned no verdict on the conspiracy charge because the district court directed it to consider that count of the indictment only if it found Flores not guilty of the CCE offense.

offenses and the encompassing conspiracy is sufficient to sustain his CCE conviction.

We hold that there was sufficient evidence to sustain Flores's conviction for conducting a continuing criminal enterprise. It is irrelevant for our purposes whether the government proved the existence of a single conspiracy spanning six years or instead proved two separate conspiracies. It is undisputed that the government established that a conspiracy existed from 1987 to 1990 that satisfied the criteria for a CCE predicate offense. We further hold that because the evidence fully supports this conspiracy, it may be used as a predicate offense to uphold the conviction under the continuing criminal enterprise statute even though it was not specifically ruled on by the jury. Thus the evidence showed that Flores committed three or more felony drug offenses as part of a continuing series of violations, and was therefore sufficient to sustain his conviction for conducting a continuing criminal enterprise.

A CCE offense under 21 U.S.C. § 848 has five elements: (1) a predicate offense violating a specified drug law (2) as part of a "continuing series" of drug violations (3) undertaken while the defendant was acting in concert with five or more other people (4) in relation to whom the defendant occupied the position of organizer or manager and (5) from which the defendant obtained substantial income or resources. United States v. Hicks, 945 F.2d 107, 109 n.1 (5th Cir. 1991) (citing Garrett v. United States, 471

U.S. 773, 786, 105 S.Ct. 2407, 2415 (1985)). Three or more related predicate drug offenses are necessary to establish the "continuing series" of violations required under the CCE statute. United States v. Johnson, 575 F.2d 1347, 1357 (5th Cir. 1978). A drug conspiracy may serve as a predicate offense to a CCE conviction. Hicks, 945 F.2d at 109. Thus, proof of a conspiracy together with proof of two other drug offenses is sufficient to establish a CCE.

It is not required that the defendant acted with all five persons at the same time. United States v. Michel, 588 F.2d 986, 1000 n.14 (5th Cir. 1979); United States v. Bolts, 558 F.2d 316, 320 (5th Cir. 1977). Nor is it necessary that the defendant occupy the same position with respect to all five persons; he may act as supervisor to some and organizer to others. United States v. Phillips, 664 F.2d 971, 1013 (5th Cir. Unit B 1981). Substantial income or resources derived from the enterprise may be proved circumstantially, Phillips, 664 F.2d at 1035, such as by proof of the exchange of thousands of dollars for drugs, Bolts, 558 F.2d at 321; evidence that large quantities of drugs moved into and out of the defendant's possession, Phillips, 664 F.2d at 1035; evidence of large expenditures in the absence of legitimate income sources, United States v. Chagra, 669 F.2d 241, 257 (5th Cir. 1982); and possession of large quantities of drugs having substantial value, Chagra, 669 F.2d at 257.

Because Flores attacks the CCE verdict primarily on grounds that the proof on the alleged conspiracy fails, we focus on that

underlying offense. To prove a conspiracy to possess with intent to distribute cocaine, the government is required to prove beyond a reasonable doubt that a conspiracy or agreement existed; that the object of the conspiracy was to unlawfully possess with the intent to distribute cocaine; and that the defendant knew of the conspiracy and intentionally and voluntarily joined and participated in the conspiracy. United States v. Gardea Carrasco, 830 F.2d 41, 44 (5th Cir. 1987). A conspiracy may be proved by circumstantial evidence, United States v. Williams-Hendricks, 805 F.2d 496, 502 (5th Cir. 1986), including concert of action, United States v. Natel, 812 F.2d 937, 940-41 (5th Cir. 1987), and may be based upon presence and association, together with other evidence. United States v. Magee, 821 F.2d 234, 239 (5th Cir. 1987).

Flores first asserts that the 1984 and 1985 cocaine transactions were not related to the subsequent offenses occurring from 1988 to 1990, nor did they occur while he was acting as an organizer or manager to at least five other people. Thus, he posits, these early transactions cannot constitute the predicate offenses necessary to establish a CCE. The government urges us to allow the CCE conviction to stand based upon proof of the 1984 and 1985 drug offenses alone. Its argument is that the finding of a single conspiracy extending from 1984 through 1990 allows it to aggregate the number of people involved in the entire conspiracy and attribute that number of individuals to the early substantive offenses to satisfy the five-person requirement. We do not decide

whether such evidence would be sufficient to sustain a CCE conviction, because we find that the government adequately proved three discrete predicate drug offenses: the conspiracy offense, the possession with intent to distribute offense, and the misuse of a communication facility offense.

Flores claims that the conspiracy count cannot constitute a predicate offense for several reasons. First, Flores argues that if the 1984 and 1985 early transactions were part of a separate conspiracy, or were not part of the conspiracy encompassing the later transactions, then the evidence would fail to establish the conspiracy as charged. He essentially asserts that the government proved two separate conspiracies, one spanning the years 1984 and 1985, and another from 1987 to 1990; thus, the conspiracy as alleged in the indictment was not proved and is therefore insufficient to serve as a CCE predicate offense. The argument is meritless. The question for us is whether a drug conspiracy was proved that will support the CCE verdict. Even if the government proved two separate conspiracies rather than one overarching conspiracy as alleged in the indictment, we have long held that we will not reverse a conviction for a variance of this nature unless the defendant establishes that (1) the evidence the government offered at trial varied from what the government alleged in the indictment, and (2) that variance prejudiced the defendant's substantial rights. United States v. Richerson, 833 F.2d 1147, 1152 (5th Cir. 1987).

It is thus unimportant--certainly for our purposes today--to determine whether one or two conspiracies existed or were proved; at the very least, the government established that a drug conspiracy existed between 1987 and 1990 that satisfied all the prerequisites of a CCE predicate offense, and the evidence of which was not at variance with the conspiracy alleged in the indictment. By 1988, when Flores began selling kilograms to Peter Seaverns, he was using others to conduct negotiations and make deliveries for him. By 1989, Joseph Peake, Luis Garcia, Seaverns, Albert Dodd, and Jesus Moncada all worked for Flores in some capacity to deliver and sell drugs, transport money, and/or buy and sell transport vehicles. In 1989, Antonio Ayala came on board. By 1990, Flores had enlisted Francisco Obregon-Sosa, apparently as an intermediary with Colombian cocaine sources. In short, this predicate offense clearly occurred while Flores was acting as an organizer or manager of five or more other people as is required by the CCE statute. Thus, this conspiracy, whether viewed as disparate and separate or simply as part of a overarching conspiracy, clearly qualifies as a predicate offense under the CCE statute. Furthermore, even if the conspiracy established at trial varied from the one alleged by the government in its indictment, it is settled law that when the "government proves multiple conspiracies and a defendant's involvement in at least one of them, then clearly there is no variance affecting that defendant's substantial rights." Richerson, 833 F.2d at 1155 (citing United States v. L'Hoste, 609

F.2d 796, 801 (5th Cir. 1980)). Flores did not establish either of the prongs of the Richerson test as is required for a reversal based on this type of variance in the evidence.

Flores next argues that the conspiracy count cannot serve as a predicate offense because the evidence does not establish that at all times during the conspiracy five other people were involved. This argument is meritless. The evidence clearly supports that at all times five or more people were involved in the conspiracy that spanned the years 1987 through 1990.

Flores further argues that even if proof of the conspiracy is sufficient, reversal of his conviction is still required because "it is not clear which three predicate offenses the jury considered in determining appellant's guilt of the CCE." (Appellant's Brief at 16.) The issue raised by Flores is essentially whether the district court was required to instruct the jury members that they must unanimously agree on the three or more continuing offenses required to convict him on the CCE count.[6] We need not resolve

[6]The Third and Seventh circuits have addressed this issue and have reached opposite conclusions. In United States v. Echeverri, 854 F.2d 638 (3rd Cir. 1988), the Third Circuit reversed the defendant's CCE conviction when the evidence showed more than three violations and the district court refused the defendant's request for an instruction requiring the jury to agree unanimously on the three acts comprising the continuing series of violations. The court reasoned that this additional instruction was required to ensure that the jurors reached a unanimous verdict on all elements of the offense. Echeverri, 854 F.2d at 643.

The Seventh Circuit reached the opposite conclusion in United States v. Canino, 949 F.2d 928, 947-48 (7th Cir. 1991), cert. denied, ___ U.S. ___, 112 S.Ct. 1940 (1992). The Canino court held that constitutional requirements for juror unanimity were met when

this issue on the record before us. Flores did not raise the issue of unanimity before the trial court and requested no instruction on the issue. The failure to give an unrequested instruction is reviewed for plain error, United States v. Rocha, 916 F.2d 219, 241 n.27 (5th Cir. 1990), which is defined as "error so fundamental as to result in a miscarriage of justice." Delancey v. Motichek Towing Serv., Inc., 427 F.2d 897, 901 (5th Cir. 1970). The jury unquestionably found Flores guilty of the possession with intent to distribute offense and the use of a communication facility to commit a drug felony offense. Most of the same evidence was relevant to, and supported, the conspiracy count. Given the further evidence of the conspiracy that was presented to the jury members at trial, we are convinced that no injustice has been visited upon Flores. We therefore need to say nothing further on this point. The jury verdict on the CCE count stands.

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each juror is convinced beyond a reasonable doubt that the defendant committed the requisite predicate offenses. The court reasoned that because the CCE offense was directed at continuing drug enterprises, no more is required than the jury's agreement that the enterprise was in fact a continuing one. Canino, 949 F.2d at 947-48. For the same reason that juror unanimity is not required for the identity of the five or more persons supervised or organized by the defendant, it is not required for the predicate offenses. Id.

B

Flores argues that with respect to the money laundering counts, the government was required to establish beyond a reasonable doubt that the funds used to purchase the Suburbans were the proceeds of unlawful activity. Because the evidence established that Flores had a legitimate source of income at the time of the purchases, and the government did not irrefutably prove that the Suburbans were not purchased with funds derived from this legitimate income source, he contends that the evidence was insufficient to prove his guilt. It is not necessary, however, that the government prove this element through direct evidence; "evidence of a differential between legitimate income and cash outflow is sufficient for a money-laundering conviction, even when the defendant claims income from additional sources." United States v. Webster, 960 F.2d 1301, 1308 (5th Cir. 1992). The evidence presented in this case conforms to that standard.

To prove a money laundering violation under 18 U.S.C. § 1956(a)(1), the government must show that the defendant (1) conducted or attempted to conduct a financial transaction, (2) that the defendant knew involved the proceeds of a specified unlawful activity, (3) with the intent to promote or further unlawful activity. United States v. Ramirez, 954 F.2d 1035, 1039 (5th Cir. 1992). Drug trafficking and CCE are specified unlawful activities. 18 U.S.C. § 1956(c)(7)(B),(C).

In Webster, the defendant was convicted of money laundering in connection with a drug conspiracy. On appeal, he argued that the evidence was insufficient to convict him on this charge because defense witnesses testified that they saw Webster gambling and winning "substantial sums of money in the thousands of dollars;" the government did not conclusively prove that he did not use this "extraneous source" money to make the purchases in question. The court dismissed Webster's argument, noting that at trial the government had presented evidence of drug sales in which Webster was allegedly involved along with evidence of Webster's legitimate income, which it contended was insufficient to support the amount of cash payments made. It held that such evidence was indeed sufficient to support a money laundering conviction. Similarly, proof of a defendant's knowledge that proceeds are from an unlawful activity may be inferred from possession of a large quantity of unexplained currency. United States v. Salazar, 958 F.2d 1285, 1296 (5th Cir.), cert. denied, ___ U.S. ___, 113 S.Ct. 185 (1992).

The evidence established that on March 1, 1990, Flores purchased two Suburbans from Seaverns at Dove Motor Company for $46,000, and that approximately two weeks later, he purchased another Suburban from Seaverns for $20,000. The three Suburbans were paid for in cash, and the titles to the vehicles were not placed in Flores's name. These three transactions formed the basis of the money laundering charges in the indictment.

Sufficient circumstantial evidence proved the origin or nature of the funds used to purchase the vehicles. Flores trafficked in substantial quantities of controlled substances for a lengthy period of time, conducted numerous cash transactions, including those involved in the money laundering counts, using nominees or false names, and had access to substantial quantities of currency. Despite his ownership of a purportedly legitimate business and possession of bank accounts, he conducted large transactions in cash. Despite efforts to show that he ran legitimate businesses, his records and those of his businesses for 1990 show that he spent $220,000 more than the businesses collected in the first five and one-half months of the year, not including payments for numerous charter airplane flights and the vehicle purchases at issue. From this evidence, a jury could find that the $60,000 in currency used to purchase the three Suburbans placed in the names of nominees or in false names was derived from illegal activity, and that Flores knew this to be the case. The jury verdict will be affirmed.

C

Flores argues that the district court erred when it considered the seizure of 1200 kilograms of cocaine in the Villa Ahumada incident in calculating his base offense level, because the government did not establish by a preponderance of the evidence that he was connected to the drugs involved in that seizure. He also argues that a "drug ledger" seized at Vista Remodeling was not sufficiently connected to him to permit the district court to

consider for sentencing purposes the 256 kilograms of cocaine described therein. Under the relevant sentencing guideline, the addition of these 1,456 kilograms raised his base offense level from 40 to 46, resulting in a mandatory life sentence.

Flores challenges specific factual findings by the district court relating to the quantity of drugs involved in his offenses; thus, we review for clear error. 18 U.S.C. § 3742(d); Pierce, 893 F.2d at 678. The government must prove sentencing facts by a preponderance of the evidence, subject to required indicia of reliability. McMillan v. Pennsylvania, 477 U.S. 79, 91, 106 S.Ct. 2411, 2418-19 (1986); United States v. Alfaro, 919 F.2d 962 (5th Cir. 1990). In determining drug quantities, the district court may consider any evidence that has "sufficient indicia of reliability." United States v. Sherrod, 964 F.2d 1501, 1508 (5th Cir. 1992) (citing U.S.S.G. § 6A1.3, comment, and United States v. Manthei, 913 F.2d 1130, 1138 (5th Cir. 1990)). These may be established by the presentence report and the court may make findings based on information contained in the presentence report. United States v. Burch, 873 F.2d 765, 767 (5th Cir. 1989)[A] presentence report generally bears sufficient indicia of reliability to be considered as evidence in making factual determinations required by the sentencing guidelines." Alfaro, 919 F.2d at 966; United States v. Murillo, 902 F.2d 1169, 1173 (5th Cir. 1990). Where a defendant presents no relevant affidavits or evidence to rebut the information in the presentence report, the court is free to adopt

the findings of the presentence report without further inquiry or explanation. United States v. Mir, 919 F.2d 940, 943 (5th Cir. 1990); United States v. Rodriguez, 897 F.2d 1324, 1327-28 (5th Cir.), cert. denied, ___U.S.___, 111 S.Ct. 158 (1990). Credibility questions raised by the sentencing information are committed to the district court's discretion. Alfaro, 919 F.2d at 955 (citing U.S.S.G. § 6A1.3).

Evidence establishing Flores's responsibility for the 1200 kilograms of cocaine seized at Villa Ahumada included the following: in March 1990, Flores acquired three late-model Suburbans, paid for in cash, placed in the names of others, and which Flores said were headed for Mexico. He was accompanied by Bermudez, who then purchased and installed radio equipment in two of them. In May, Flores had several conversations about locating an appropriate landing strip, well paved but not too far away. In another conversation on May 23, he made arrangements with Bermudez to meet a pilot. On June 7, when planes hauling the 1200 kilograms of cocaine were intercepted in Villa Ahumada, Mexico, at least one of Flores's Suburbans was present, as was his co-conspirator and brother-in-law Jesus Moncada. In subsequent telephone conversations, Flores discussed the Villa Ahumada seizure and arrests; according to the presentence report, he also told Seaverns of the seizure. On June 9, 10, and 12, Flores and Bermudez chartered three flights from El Paso to Miami; according to Peake, the flights transported Colombian pilots to Florida.

Flores offered the testimony of Ivan Enriquez, a private investigator hired by Flores, in rebuttal. Enriquez stated that he had interviewed Ismael Navarrete and Juan Carlos Lozoya and that both individuals had denied their involvement in the purchase of the three Suburbans from Seaverns at Dove Motor Company. This testimony directly contradicted that of Seaverns. Enriquez further testified that he had interviewed Hugo Adrian De La Rosa, and that De La Rosa told him that the statement that De La Rosa had given to Mexican police implicating Flores in the Villa Ahumada affair was elicited only after De La Rosa had been tortured by them. De La Rosa subsequently retracted his statement. Enriquez then testified that he had interviewed Francisco Obregon-Sosa at a Mexican prison and that Obregon-Sosa also denied delivering $40,000 to Seaverns for the purchase of the Suburbans. Flores also offered a portion of a Mexican judicial proceeding dismissing charges against Moncada and others in the incident, and finding the evidence insufficient to charge Flores with the affair.

Thus, the district court was presented with a choice between the conflicting evidence presented by the government and Flores. This choice was committed to its discretion. Considering the various sources of information linking Flores to the Villa Ahumada affair, the trial court could reasonably decline to credit the contradicting evidence presented by Flores. In short, the district court's finding is supported by the record and cannot be said to be clearly erroneous.

The "drug ledger" seized at Vista Remodeling was also sufficiently connected to Flores to permit the district court to consider the 256 kilograms of cocaine described therein for sentencing purposes. In addition to figures and notations on the document, including names of co-conspirators and words denoting kilograms ("llaves"), other evidence corroborated Flores's involvement in that quantity of cocaine: the document reflected a transaction in California, he lost $1.4 million to a seizure in California, and he was otherwise involved in trafficking large quantities of cocaine. The information had "sufficient indicia of reliability" to support the district court's finding; Flores's sentence was correctly calculated. The sentence will be affirmed.

IV

The evidence proved that Flores committed three or more felony drug offenses as part of a continuing series of violations; this evidence was sufficient to sustain his conviction for conducting a continuing criminal enterprise. Additionally, sufficient circumstantial evidence proved that cash used by Flores in March 1990 to buy three Suburbans was the proceeds of unlawful activity. Finally, the district court's decision to include 1200 kilograms of cocaine seized in Villa Ahumada and 256 kilograms of cocaine referenced on a drug ledger seized at Vista Remodeling in calculating the relevant drug quantity for sentencing was not clearly erroneous. Flores's convictions and sentence are

A F F I R M E D.